

Pine Bluff service area. The attachments were inspected after WEHCO installed the cable, and revealed 55 violations that WEHCO was instructed to correct on or about October 22, 2002.¹⁵⁷

71. As the result of these ongoing issues, EAI engaged USS to conduct a test inspection in February and March of 2004 of one circuit in WEHCO's Pine Bluff service area and of portions of 4 circuits in WEHCO's Searcy service area.¹⁵⁸ WEHCO was made aware of the upcoming test inspection in January 2004 through communications between EAI and WEHCO personnel including Donny Gaines, Charlotte Dial and Bill Haynie.¹⁵⁹ WEHCO was never denied the opportunity to accompany USS in its test safety inspection and, despite knowledge of the test safety inspection, WEHCO did not inquire about accompanying USS until the day before the inspection was complete.¹⁶⁰ The test inspection revealed an astounding 83% violation rate in Searcy (1,064 violations out of 1,275 attachments on 777 poles), and an 87% violation rate in Pine Bluff (482 violations out of 556 attachments on 537 poles).¹⁶¹

72. Breaking down the violations, this included 1,042 clearance violations (approximately 66% of the total violations), 80 anchoring violations, 332 bonding violations, 69 guy marker violations and 23 other violations.¹⁶² Evaluating only EAI-owned poles, this still includes 957 clearance violations, 76 anchoring violations, 317 bonding violations, 64 guy marker violations,

¹⁵⁷ Declaration of Tony Wagoner at ¶ 51.

¹⁵⁸ Declaration of Michael Willems at ¶ 16; Declaration of Wayne Harrell at ¶ 24.

¹⁵⁹ Declaration of Michael Willems at ¶ 16.

¹⁶⁰ Declaration of Michael Willems at ¶ 17.

¹⁶¹ Declaration of Wilfred Arnett at Attachment C.

¹⁶² Declaration of Wilfred Arnett at Attachment C.

and 19 other violations for a total of 1433 violations. To date, WEHCO has made *no* efforts to repair its facilities, and has not provided EAI with any specific disputes.¹⁶³

D. Cox

73. The situation with Cox is cut from an entirely different cloth than the complaints of the other Cable Operators, and as such, EAI requests that Cox's complaint be dismissed. The inspections related to Cox's facilities were pre-construction make-ready assessments and post-construction inspections – not safety inspections initiated as a result of outages or damage.¹⁶⁴ Any "fears" expressed as to a safety inspection of their facilities are entirely speculative, and as such are unripe.

74. Cox has recently completed system rebuilds in several of its Arkansas service areas, including Magnolia and Malvern, and is beginning rebuilds in the Gurdon and Russellville, Arkansas areas. Unlike its experience with Comcast, Alliance, and WEHCO, Cox has been willing to cooperate and work with EAI and USS to identify and rectify violations of the Cox pole attachment agreement found during pre-construction planning and post-construction inspection.

75. For example, the rebuild in Magnolia is complete and all noted violations have been corrected by Cox.¹⁶⁵ Additionally, Cox, EAI and USS have met on several occasions to discuss compliance with the Cox pole attachment agreement and to review preliminary work in

¹⁶³ Declaration of Wilfred Arnett at Attachment C; Declaration of Michael Willems at ¶ 13.

¹⁶⁴ Declaration of Wayne Harrell at ¶¶ 17-19; Declaration of Tony Wagoner at ¶ 52.

¹⁶⁵ Declaration of Tony Wagoner at ¶ 56; Declaration of Wayne Harrell at ¶ 18.

additional service areas.¹⁶⁶ In fact, Cox apparently was so satisfied with USS' work, that they hired USS to conduct pre- and post-construction inspections and complete make-ready work now ongoing in Jonesboro, Arkansas in connection with a total rebuild project on another utility's poles.¹⁶⁷

76. The consultation with EAI and USS before construction resulted in increased compliance with engineering standards and relatively few incidents of incorrect engineering in post-construction inspections. In Magnolia, where Cox and its contractor chose to cooperate with EAI and USS, very few violations were identified in the USS post-construction inspection. Those violations were corrected by Cox.¹⁶⁸ In Malvern, where Cox was also instructed as to the requirements of the Cox pole attachment agreement before work commenced and where further instruction was offered to Cox and its contractor throughout the process, there were only 378 violations noted in the USS post-construction inspection.¹⁶⁹ Of those violations, 108 remain outstanding.¹⁷⁰ Considering EAI-owned poles only in Malvern, only 338 violations were identified, of which 139 still require corrective action.¹⁷¹

¹⁶⁶ Declaration of Tony Wagoner at ¶ 26.

¹⁶⁷ Declaration of Tony Wagoner at ¶ 55.

¹⁶⁸ Declaration of Tony Wagoner at ¶ 56.

¹⁶⁹ Id at ¶ 56.

¹⁷⁰ Id at ¶ 56.

¹⁷¹ Specific breakdowns for Cox violations are included in the Declaration of Wilfred Arnett at Attachment C.

V. DISCUSSION

A. The Agency Must Require Complainants to Adhere to Safety Codes and Remediate Safety Violations in a Timely Manner

77. Under EAI's pole attachment agreements, attaching entities are required to take "immediate action" to remedy safety violations.¹⁷² This provision is reasonable and necessary in light of the nature of the violations, and the safety implications for the employees and contractors of EAI and all attachers, as well as the general public. Despite these concerns, however, and despite EAI's willingness to work with Complainants to address particular disputes associated with a cited violation, Complainants have continued to delay and stall with respect to the corrective actions necessary to remedy these unsafe conditions. As discussed above, some violations were identified and noticed to Complainants during the initial test inspections in 2001 and 2002, and the vast majority of these violations remain unresolved.¹⁷³ Complainants have engaged in a concerted and orchestrated attempt to delay, deny and stonewall EAI at every turn, and the Cable Operators' complaints are directed towards evading their responsibilities to ensure safe plant conditions. They are now simply aggrieved that they have been caught with respect to their slipshod and faulty construction practices, and must now put forth the time and money to bring up to standard those facilities they had hoped would evade EAI's notice.

78. Again, where the Complainants have a legitimate dispute as whether or not the condition cited is a violation of the NESC or of the contract specifications, they have always been free to present this dispute to EAI and USS.¹⁷⁴ It has consistently been EAI's position, which has been conveyed to the Complainants on numerous occasions, if they can have an Arkansas-licensed

¹⁷² Pole Attachment Agreement at Article V.

¹⁷³ Declaration of Wilfred Arnett at Attachment C.

¹⁷⁴ Declaration of David B. Inman at ¶ 36.

professional engineer certify that a USS cited violation is incorrect or grandfathered, that would be sufficient to “clear” the violation.¹⁷⁵ This is the same standard that EAI has utilized and employed when USS has identified violations that pertain to EAI facilities.¹⁷⁶ The Cable Operators, however, have neither availed themselves of this option nor resolved the remaining safety violations. This is clearly unacceptable, and the FCC must not permit their continued reticence and inaction to continue.

B. Contrary to Claims by Complainants, EAI’s Safety Standards and Its Implementation of Its Standards are Reasonable and Appropriate

79. Complainants argue that any safety provision in excess of the NESC is *per se* unreasonable, and they should not be required to adhere to any more stringent standards, regardless of what they may be. The FCC, however, has never “capped” the safety and engineering standards that utilities may require of the attaching entities on their poles, nor has the State of Arkansas (as erroneously asserted by Complainants). While industry codes may be used to illustrate the reasonableness of a particular engineering standard,¹⁷⁷ requirements in excess of the NESC or similar codes are not *per se* unreasonable.

80. In fact, in a recent survey conducted by the Southeast Electrical Exchange (“SEE”), a regional standards setting body for the electrical industry, all respondents indicated they employed standards other than the minimum requirements of the NESC to govern their plant, including: requiring 12 inches of separation between communications cables (even prior to the

¹⁷⁵ Id at ¶ 35.

¹⁷⁶ Declaration of David Kelley at ¶ 12.

¹⁷⁷ See, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers Local Competition, *Order*, 14 FCC Rcd. 18049 at ¶ 1147 (1999).

2002 changes to the NESC code); not permitting only 30-inches of separation between communications cables and the neutral wire at the pole; not permitting only 12 inches between communications wires and the neutral wire at mid-span; and prohibiting the use of existing utility anchors by cable companies.¹⁷⁸ Most respondents also required bonding where the utility has a ground wire on the pole (even prior to 2002).¹⁷⁹

81. By way of example as to how utilities employ the NESC as a guideline, the Edison Electric Institute and United Telecom Council relate that in the experience of one member utility the Company has considered factors outside of the NESC to develop and/or change engineering and construction standards and associated work practices. For example, to protect Company personnel as well as other attachers, Company rules require treatment of the neutral as an energized line and the appropriate precautions and protections are required at all times (Ground to Ground Rule). When the NESC added exceptions in the code to allow at-pole clearances of 30" vs. 40" and in-span clearances of 12" vs. 30," the Company, after much review and examination, did not accept the exceptions.¹⁸⁰

82. "Industry practice," therefore, clearly validates the NESC's own pronouncement as to its purpose as a *minimum* standard subject to local and regional requirements and the unique engineering and business considerations of individual utilities.

¹⁷⁸ See Declaration of Thomas Jackson at ¶¶ 5-7. The survey was conducted by SEE at EAI's request with respondents including eight of the largest utilities in the Southeastern United States.

¹⁷⁹ Id.

¹⁸⁰ Letter dated April 19, 2005 from Edison Electric Institute and United Telecom Council to Wm. Webster Darling at pp. 5-6, attached as Exhibit "81."

83. In fact, the FCC has acknowledged on several occasions that utilities may have their own standards in excess of an industry code such as the NESC and that these standards should be respected. In particular, in 1996 when addressing the circumstances under which a utility may deny access, the FCC considered and specifically rejected mandating the NESC as the blanket standard.¹⁸¹ The Agency noted with approval that utilities have “developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise.”¹⁸² Moreover, a “utility's individual standards cover not simply its policy with respect to attachments, *but all aspects of its business*. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions.”¹⁸³ In this respect, the Commission noted that because:

“there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards. In addition, increasing competition in the provision of electricity is forcing electric utilities to engineer their systems more precisely, in a way that is tailored to meet the specific needs of the electric company and its customers. As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences.”¹⁸⁴

Complainants now seek to undo this established reasoning arrived at in an open rulemaking proceeding and to have the FCC overturn a decision in a limited adjudicatory proceeding. This is clearly inappropriate, and the Agency should decline.

¹⁸¹ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 11 FCC Rcd 15499, ¶¶ 1143-1150 (1999).

¹⁸² Id.

¹⁸³ Id. (Emphasis added).

¹⁸⁴ Id.

84. The FCC has also acknowledged that local factors, such as extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility's safety and engineering practices, particularly pole attachment policies.¹⁸⁵ Considering these variables is important when drafting pole attachment agreements and considering individual attachment requests.¹⁸⁶ As the FCC concluded, "The number of [local, regional and environmental] variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements. Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we."¹⁸⁷ The reasonableness of particular conditions of access imposed by a utility, therefore, is case-specific.¹⁸⁸

85. Complainants have offered no evidence as to the unreasonableness of EAI's standards other than to simply assert that they are in excess of the NESC, and as such they have failed to even establish a *prima facie* case as to EAI's unreasonableness. Other than to conform with more stringent updates to the NESC, EAI's attachment specifications have not changed for more than twenty years since the inception of each pole attachment contract. Complainants, therefore, have been on notice of the applicable engineering and safety standards since day one.

86. Furthermore, the vast majority of EAI's engineering and safety standards track the provisions of the NESC and are *not*, in fact, in excess of the NESC. Rather, as discussed below, in most instances where Complainants claim EAI's standards exceed the NESC, they actually

¹⁸⁵ Id.

¹⁸⁶ Id.

¹⁸⁷ Id. at ¶ 1149.

¹⁸⁸ Id. at ¶ 1143.

track the general requirements of the NESC and merely eliminate complex exceptions that are difficult or costly to prove, or that should not be determined by untrained cable installers in the field. Moreover, adhering to the basic NESC provisions, without employing the exceptions Complainants seek, does not in itself pose any additional financial burden on Complainants for installation and maintenance of their facilities. On the contrary, in some instances, the slightly different standards EAI requires would actually save the Complainants time and money. In any event, as illustrated above, the *vast* majority of cited violations would still be violations of the NESC even assuming Complainants could meet the terms of a cited exception to the general rules of the Code.

1. The NESC is Specified by Contract and State Law as a *Minimum Standard*

87. The FCC has recognized that industry may rely on the NESC, OSHA and state safety requirements as evidence of the reasonableness of particular engineering standards. In particular, Complainants rely on the NESC, and assert that the NESC is the *only* standard to which they should be held, or to which EAI should be permitted to hold them. Complainants, however, misconstrue the binding nature of the NESC, and would set it up as a ceiling rather than what it actually is by its own terms and according to Arkansas Law – a minimum. Specifically, the NESC states that the guidelines contained therein are only “basic,” and that the code is “not intended as a design specification or as an instruction manual.”¹⁸⁹ The Arkansas Code provides plainly that “[c]onstruction of telecommunications lines and facilities by a telecommunications company or cooperative *as a minimum requirement* shall comply with the standards of the

¹⁸⁹ NESC at 010.

National Electrical Safety Code in effect at the time of the construction ...¹⁹⁰ Moreover, the NESC is just one of many sources of information utilities use to develop construction standards, operating procedures and work practices. A few of the sources used include, but are not limited to, the following:

- American National Standards Institute (ANSI),
- Electric Power Research Institute (EPRI),
- Occupational Safety & Health Administration (OSHA),
- Regulatory bodies and Local, State and Federal rules and regulations.¹⁹¹

88. The agency should permit EAI to make the decision as to the risk it chooses to bear and the standards it chooses to employ, so long as such requirements are reasonable. Complainants are asking the FCC to take the position that *any* requirement in excess of the NESC is unreasonable. As discussed above, industry practice, state law, FCC precedent and the NESC itself illustrate the fallacy of this argument. Moreover, regulation of electric utility engineering standards is a matter typically and more appropriately addressed on a local level by the state PSCs, or by agencies with specific expertise in electric safety and reliability issues.¹⁹² Accordingly, the agency must deny Complainants' request.

2. EAI Has Attempted to Reasonably Accommodate Complainants as to Past Violations

89. Over the course of the dispute, EAI and USS have consistently met with, and made concessions to, Complainants in a good faith effort to resolve ongoing disputes and to facilitate

¹⁹⁰ Ark. Code Ann. § 23-17-236 (emphasis added).

¹⁹¹ Letter dated April 19, 2005 from Edison Electric Institute and United Telecom Council to Wm. Webster Darling at p. 5.

¹⁹² Id. at p. 4; Declaration of Steve Strickland at ¶ 5.

the timely clean up of engineering and safety violations.¹⁹³ EAI and USS have attempted to find solutions in the field, and have consistently engaged in a dialogue with Complainants to attempt to reasonably resolve specific disputes.¹⁹⁴ EAI's primary goal is to secure the safety of its employees, contractors and the public by ensuring that its facilities and those attached by others to its poles are installed and maintained in a sound manner. Complainants have hindered EAI in this goal through their persistent stonewalling and unwillingness to engage in specific discussion of disputed violations.

90. While FCC precedent and sound engineering support the fact that EAI is entitled to require reasonable engineering standards that differ from the NESC, where appropriate in its judgment and as warranted according to the specific attributes of EAI's system, EAI has attempted to accommodate Complainants by permitting them to remedy past violations by bringing those facilities into conformance with the applicable NESC provision. If a Cable Operator can document grandfathered status through its own records or by other means and can provide certification from an Arkansas licensed professional engineer, EAI will accept such a determination.¹⁹⁵ Otherwise, EAI believes the current edition of the NESC and the contract specifications are appropriate standards. Regardless, however, in the absence of any evidence to the contrary, EAI believes it is reasonable and appropriate for the FCC to require the Cable Operators to conform all future attachments to the terms of the pole attachment agreements.

¹⁹³ Declaration of David B. Inman at ¶ 35.

¹⁹⁴ EAI notes that the declarants on behalf of the Cable Operators, however, signed their declarations days in advance of the pre-complaint mediation conducted in this case.

¹⁹⁵ Declaration of David B. Inman at ¶ 35.

3. EAI's Standards are Reasonable and Appropriate in Light of Local Factors and the Attributes of EAI's Network

The majority of EAI's engineering provisions track the NESC. Those few that do not, as described below, are reasonable and relate to the specific needs of EAI's pole plant and its reasonable judgment as the steward of its electrical operations. These requirements are not "far in excess" of the NESC as alleged by Complainants, but are rather designed to protect all who come in contact with the poles and to save time and money for all involved. Moreover, the often single-sentence objections of Complainants amount to little more than bald assertions that EAI's requirements are unreasonable simply due to the fact that they "exceed the NESC." As discussed above, this is clearly not the case and does not even approach a showing necessary to make a *prima facie* case of unreasonableness. Accordingly, these objections by Complainants must be rejected.

a. Grandfathering

91. Complainants assert that EAI has refused to allow them to apply the NESC grandfathering provision to its facilities, and instead is requiring unnecessary upgrades to the 2002 Code. This is, however, not the case. What EAI has *not* been willing to do, however, is to accept a blanket statement by the Complainants that all facilities currently existing on EAI's poles qualify for grandfathering. This is precisely the approach rejected in *Knology v. Georgia Power*, and EAI should not be required to accept such general assertions here.¹⁹⁶ Moreover, in actuality, the grandfathering provision of the NESC was not put into place until 1977 – well after Complainants claim the majority of their plant was initially installed.¹⁹⁷ Moreover, the

¹⁹⁶ *Knology* at ¶ 39.

¹⁹⁷ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 45.

grandfathering provision of the NESC is not amenable to blanket application. It is dependent upon the dates associated with the specific equipment on a specific pole.¹⁹⁸

92. Grandfathering, like establishing responsibility for correction of a violation, is not particularly amenable to being applied in the field by an inspector without access to specific equipment records. For example, during the safety inspections, responsibility for correcting violations was allocated based on an assessment of the physical evidence, and the violation was generally attributed to the party that installed the last facility at that location.¹⁹⁹ Some physical evidence available in the field can assist in determining the age of the facilities, such as pole ownership identification, the birthmark of the pole (which shows the manufacture date of the pole), the physical condition of all outside plant and hardware on that pole (evidence of exposure to weather, rusting, etc.), the inspector's knowledge of the vintage of the various pieces of hardware, and the age of the houses and businesses served by the plant. Additionally, some hardware items that are installed on the pole have manufacture dates which provide solid clues as to the relative dates of installation.²⁰⁰ This provides some method of determining the age of attachments relative to each other. Knowledge of the specific installation date for a cable facility, and accordingly the applicable NESC code version for grandfathering purposes, if applicable, however, generally can *not* be determined based on physical evidence alone.²⁰¹

93. As to responsibility for correcting a violation where physical evidence is inconclusive, however, it was reasonable and necessary during the safety inspections to rely on common sense

¹⁹⁸ *Id.* at ¶ 43.

¹⁹⁹ Declaration of Tony Wagoner at ¶¶ 20-24.

²⁰⁰ *Id.*

²⁰¹ *Id.*

and known industry practice with respect to how electric distribution plants are constructed.

Except in rare situations, the power company is the first to serve an area. Generally, the incumbent telephone company ("ILEC") is next on the pole as they, like the power company, are required to serve all requests in their "certificated area." In most cases, CATV providers are the last to install facilities because their investment decisions and plant additions are driven by economics, instead of a governmental requirement to serve and they have no guaranteed rate of return through the various state PSC regulations.²⁰²

94. Therefore, absent any information to the contrary, the inspector's logical assumption during the safety inspections was that the power company arrived first, the ILEC arrived second and the cable company arrived last on the pole. As EAI owns the majority of the poles employed in building their facilities, it is certain that they not only installed the poles, but also that the associated electric hardware to serve the customer/customers that generated the need for the pole was installed first. In all but rare cases, the Cable Operators attached at a later date.²⁰³ In locations where it was obvious that EAI or another party installed facilities subsequent to the installation of the CATV system (*i.e.*, cable plant showed signs of weathering where electric facilities did not) and those facilities caused violations of the NESC or the pole-owner's standards, the responsibility for the violation was attributed to EAI or the other party, as appropriate.²⁰⁴ For example, locations where the violation resulted from inadequate separation between a CATV attachment and a power riser would be attributed to EAI if the inspector could

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

determine that the power riser was installed recently (*i.e.* new house or convenience store) and it was obvious that CATV had been there prior to that installation.²⁰⁵

95. EAI has consistently agreed that the grandfathering provisions of the NESC can and should apply to the Complainants' facilities. The Cable Operators, however, are in the best position to track and identify the age, installation date, and date of any repairs to their own facilities (particularly as the Cable Operators do not keep EAI apprised of their repair, upgrade and other activities).²⁰⁶ Accordingly, if a Complainant can illustrate grandfathering for a *particular* installation or show that its facilities predated EAI's facilities (where physical evidence did not otherwise indicate that power was the later-installed facility) by providing certification from a professional engineer licensed in the State of Arkansas to that effect, EAI will accept such certification.²⁰⁷ This is precisely the same standard and method that EAI uses in addressing its own facilities and applying the NESC grandfathering provision to the elements of its electric plant.

b. 12-Inch Communications Cable Separation

96. The 12-inch separation between communication cables of which the Cable Operators complain has been in place since the original pole attachment agreements were signed.²⁰⁸ Complainants have therefore been on notice of the contract requirement for the duration of the relationship between the parties. EAI's enforcement of an acknowledged and employed standard, therefore, is entirely reasonable. Moreover, installing facilities pursuant to this

²⁰⁵ *Id.*

²⁰⁶ Declaration of Tony Wagoner at ¶¶ 20-24.

²⁰⁷ Declaration of David B. Inman at ¶ 35.

²⁰⁸ See Exhibits "2A-2D" of the Complaint.

standard is no more costly or time consuming than it would be to install facilities at 9 inches or 15 inches, for example. Later adoption of the 12-inch requirement by the NESC also illustrates the reasonableness of EAI's pre-existing requirement for 12 inches of separation. Paragraph 3.06 of Section 3.B BellCore BlueBook, the telecommunications industry's standard engineering guidelines, also requires 12 inches of separation between communications attachments. In any event, the 2002 NESC itself cites 12-inches as the general default rule, as Complainants acknowledge, unless the *communications* companies *and* the pole owner agree to lesser spacing.²⁰⁹ EAI is not in the position to make such a concession on the part of other licensees to EAI's poles, and the agency should not require it to amend or contradict its obligations under previously existing joint-use contracts with telecommunications operators to provide 12 inches of space in order to accommodate the Cable Operators' use of an exception to a general rule that has been in place as a contract requirement for decades.

97. The Cable Operators are simply aggrieved that EAI has asked them to adhere to standards to which they have already agreed. Separation of less than 12 inches impacts the other joint users of the poles including the telephone company, whose agreement with EAI predate its obligations to Complainants. Any separation of less than 12 inches between the communication cables should be addressed between the Cable Operator and the telecommunications company to whom they are proximate on the pole.

98. Where Mr. Harrelson's report reprimands EAI for requiring Complainants rather than the telecommunications companies to move to create 12 inches of separation, his analysis overlooks the fact that in most instances it is inadvisable to require the telecommunications companies to

²⁰⁹ NESC at 235.C.

move their cables downward in closer proximity to the general public.²¹⁰ In particular, pole number 39 in Circuit F320 addressed by Mr. Harrelson is proximate to a railroad crossing, which would prevent moving any facilities closer to the ground.²¹¹ Mr. Harrelson also later contradicts his assertion that EAI fails to enforce separation requirements for telecommunications companies when he discusses pole 894 in Circuit D920, which specifically requires the telephone company to resag its lines to maintain mid-span separation.²¹² Mr. Harrelson's errors in this regard illustrate the difficulty of making general assumptions without taking into account the specific (in this case extremely local) attributes of *specific* poles when applying engineering standards and recommending remedies.

99. Complainants now seek shelter under the NESC only as an attempt to cover up past violations and errors. This should not be countenanced by the FCC as the Cable Operators are essentially arguing that they should have been free all along to ignore requirements that EAI chose to impose that were in excess of the NESC. This is simply not the state of the law.

c. Bonding

100. Like its separation requirements, EAI's bonding requirements have been in place since the initial pole attachment agreements with Complainants were signed.²¹³ Bonding requirements are particularly important, as an inadequately bonded system poses an electrocution risk and

²¹⁰ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 53.

²¹¹ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 53.

²¹² Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 54.

²¹³ See Pole Attachment Agreement at Section 2.7.

could result in the death of a contractor,²¹⁴ and may also cause EAI protective devices to mis-operate, including not operating at all. EAI also specifically incorporated its bonding standards into the main body of the pole attachment agreement to protect the health and safety of its crews and the crews of licensees on its poles.²¹⁵

101. Moreover, bonding is another example where determining compliance with the NESC minimum would require a substantial amount of time and effort beyond what would simply be required to bond each pole where a vertical ground wire exists per the contract standard. The NESC generally requires bonding on four poles per mile. Counting bonded poles to determine if a particular string of poles in a mile complies with the requirement is time consuming, and even where a one mile segment complies, the segment immediately adjacent may not comply, resulting in the need to frequently recalculate the concentration of bonds to determine compliance.²¹⁶ The much safer and faster method for addressing this potential hazard is to simply require bonds for each pole where a vertical ground wire exists. This eliminates the need to calculate bond concentration, and provides additional security for contractors. The cable industry's standard engineering manual also recognizes the importance of bonding, noting that the support of the coaxial cable shall be bonded to the telephone strand or other existing pole grounds as specified by the EAI's pole attachment agreements.²¹⁷

²¹⁴ See, e.g., *Union Electric Co. dba AmerenUE v. Southwestern Bell Tel., L.P.*, 378 F.3d 781 (8th Cir. 2004) (CATV lineman killed when coming into contact with unbonded wire).

²¹⁵ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 55.

²¹⁶ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 56.

²¹⁷ Society of Cable Telecommunications Engineers, *Recommended Practices for Coaxial Cable Construction and Testing*, at 6.9 (2002).

d. Residential Service Drops

102. The Cable Operators also complain that EAI is requiring them to comply with current clearances for residential drops, and argue that many of their drops should qualify for grandfathering.²¹⁸ Again, if this is the case, Complainants should be able to tell through service records for a particular location when the drop was installed, and to provide EAI with sign-off from an Arkansas licensed professional engineer certifying that the drop is grandfathered under the NESC. However, they have not done so, and if they do, this will be sufficient in EAI's opinion to resolve a particular violation.²¹⁹ Where EAI's service drops are not up to the current NESC, this is precisely the process that it has employed, including making an evaluation of the appropriate code based on the date of the facility and in specific reference to the location and environment in which the pole is located after a field visit.

103. Moreover, as noted above, it may in fact be the case that certain of the CATV installations in question were installed before the grandfathering provisions of the NESC were instituted in 1977, in which case grandfathering may not apply at all. Regardless, the validity of applying the grandfathering provisions of the NESC cannot be gauged on a general basis, but requires the specific application to a particular location where the installation date of the service drop in question is known.²²⁰

²¹⁸ Complaint at ¶ 261.

²¹⁹ Declaration of David B. Inman at ¶ 35.

²²⁰ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 43. Mr. Harrelson's use of pole 186 to argue for application of 8 feet of clearance versus 10 feet is also ironic, given that the drop in question is only approximately 4 feet from the ground – a clear violation of any standard. Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 60.

e. Anchors and Guying

104. As outlined above, EAI has established joint use contracts with SBC and other telecommunications companies that pre-date the Cable Operators' pole attachment agreements. These prior agreements provide the right to the telecommunications companies to attach to EAI's anchors where feasible from an engineering perspective. In this respect, the Cable Operators are seeking to invalidate or force EAI to breach its prior agreements, which is wholly inappropriate and which the FCC has not required in the past and should not require now.²²¹

105. EAI has not "permitted" the practice as alleged by Complainants. Moreover, even if EAI could give the Cable Operators' the right to use EAI's existing anchors, *as noted by Complainants* a load/stress test would have to be conducted in order to determine if the existing anchor would be sufficient – which they have not done.²²² Requiring Complainants to set their own anchors is more efficient and, in fact, less onerous and less costly than requiring them to conduct the calculations necessary to determine if "piggy-backing" is even an option with respect to a particular anchor.²²³

106. Again, with regard to each of the cited violations the Cable Operators claim are not violations of the NESC, EAI has consistently stated that it will accept the certification of an Arkansas-licensed professional engineer that a particular condition existing with respect to a

²²¹ *Newport News* at ¶ 16, n. 38.

²²² Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 61; Complaint at ¶ 269.

²²³ See, *Newport News* at ¶ 15 (permitting a guying standard to stand where it was less onerous than the calculations that would otherwise be necessary to determine if guying was required for safety reasons).

particular cable facility complies with the NESC.²²⁴ Assuming a Complainant obtains permission from the telecommunications joint user that has the right to use EAI's anchor, EAI would accept a loading analysis indicating that the existing anchor may handle the additional attachment or certification from an Arkansas-licensed professional engineer that no anchor was necessary with respect to a particular pole. To speak in broad generalities or "classes" of violations as Complainants persist in doing is counter-productive and ultimately inefficient, as it is inappropriate and even dangerous to attempt to "clear" whole swaths of engineering conditions without making an individual evaluation as to the safety of a specific facility.

f. Guy Markers

107. As identified above with respect to guy markers, locations which were cited as violations by USS were, in its opinion, potentially subject to pedestrian traffic and require the placement of guy markers on the down guy wires for purposes of visibility and obvious safety reasons.²²⁵

These inexpensive identifiers are necessary for the protection of the general public to clearly warn pedestrians, bicyclers and others of the presence of a guy so that it may be avoided. Again, EAI and USS have repeatedly advised Complainants that if their engineers dispute a particular violation, EAI and USS will consider these violations on a case-by-case basis, provided that a professional electrical engineer licensed in the State of Arkansas certifies in writing that there is no violation.²²⁶

²²⁴ Declaration of David B. Inman at ¶ 35.

²²⁵ Declaration of Tony Wagoner at ¶ 47; Declaration of John Tabor at ¶ 19.

²²⁶ Declaration of David B. Inman at ¶ 35.

g. 9-Inch Span Separation Between Communications Cables

108. Complainants object to EAI's requirement that mid-span clearances between communications cables measure nine inches.²²⁷ This issue relates only to approximately 39 cited violations, and is easily solved by either re-sagging the lines or raising the attachments, if possible, at a minimal cost. Again, however, Complainants fail to explain why this requirement is unreasonable or overly burdensome except that it exceeds the NESC. Moreover, their arguments in this regard are blatantly inconsistent. The cited 4-inch exception first appeared in the NESC in 2002.²²⁸ Accordingly, this should only apply to installations made after that date. Complainants are seeking to have the 2002 Code apply *only* where it is to their benefit.²²⁹

h. At the Pole and Span Separation Between Neutral and Communications Cable

109. As Complainants note, albeit obscurely, the NESC *standard* for separation between communications cables and the utility's neutral is 40 inches.²³⁰ Thirty inches is the *exception* only when very specific criteria are met.²³¹ Practically speaking, however, CATV installers and CATV line crews who come into contact with the pole during installations or upgrades are not trained, nor is it practical to train them, to recognize when the exception should apply rather than the rule of 40 inch separation. Determining if a particular facility falls within the one of the exceptions to the 40-inch rule can also be costly and time consuming.²³² Accordingly, given the

²²⁷ Complaint at ¶ 270.

²²⁸ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 74.

²²⁹ *Id.*

²³⁰ Complaint at ¶ 307.

²³¹ NESC Table 235-5.

²³² Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., ¶ 77.

untrained CATV crews and the time and cost associated with determining when the 30-inch exception may apply, EAI believes it makes more sense from a logistical and safety perspective to adhere to the norm – 40 inches – rather than attempt to ferret out those few instances where an exception may be appropriate.

110. Even if the exception were found to apply, the vast majority of Complainants' violations related to separation between the CATV facility and the electric neutral, violate *both* the 40-inch rule *and* the 30-inch exception.²³³ For example, Comcast was cited for violations including 1,559 instances where their facilities were *11 inches or less* from the neutral – a condition that is extremely dangerous for any CATV crewman required to work in proximity to one of these locations.²³⁴ Further, 3,240 Comcast violations were for facilities located between 20 and 29 inches from the neutral. Only 1,019 of the violations attributed to Comcast relate to facilities between 30 and 40 inches from the neutral, which may or many not qualify for the exception cited by Complainants.²³⁵

111. Nonetheless, EAI had previously indicated to Complainants that it is willing to permit 30 inches separation where an Arkansas-licensed professional engineer will certify that the facility falls within one of the exceptions to the general 40-inch rule present in the NESC.²³⁶ EAI remains willing to do so as a reasonable accommodation to the Cable Operators. In no instances, however, should Complainants be permitted to shirk their responsibility to ensure the safety of their facilities by remedying those violations that do not qualify for the cited exception.

²³³ Declaration of Wilfred Arnett at ¶ 24.

²³⁴ Declaration of Wilfred Arnett at ¶ 24.

²³⁵ Declaration of Wilfred Arnett at ¶ 24.

²³⁶ Declaration of David B. Inman at ¶ 35.

112. Similarly, Complainants also object to the requirements that they adhere to a 30-inch separation standard at mid-span between the CATV cable and the utility's neutral wire.²³⁷ Ironically, the exception they cite, which permits 12-inch separation in certain instances, is dependent upon effective bonding on the pole, to which Complainants have also objected.²³⁸ Again, however, the sheer magnitude of violations clearly illustrates the extent of the problem. For example, Comcast was cited for 4,112 mid-span violations between the CATV cable and the neutral wire. Even if every pole were effectively bonded, and every instance cited were eligible for the 12-inch exception, Comcast would *still* have 3,524 violations to correct. Moreover, the 12-inch exception only applies for neutral and supply cables that meet certain specifications.²³⁹ In the great majority of cases, given EAI's system architecture, *this exception would never apply*.²⁴⁰

i. Riser Cables

113. Finally, Complainants argue that EAI has misinterpreted the NESC with respect to situations where primary voltage riser cables have less than 40 inches of the riser guard above the communications space. Complainants cite an exception to the 40-inch requirement where certain types of cable are involved. The large majority of EAI's secondary voltage cables, however, do not meet the terms of this exception and do, in fact, require 40 inches of space.²⁴¹ Even for those that would qualify, which is very few, EAI determined that it was appropriate to

²³⁷ Complaint at ¶ 308.

²³⁸ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶¶ 72-73.

²³⁹ NESC Section 235C2B(1)(a).

²⁴⁰ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 73.

²⁴¹ Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 73.

retain the 40-inch requirement because CATV installers in the field are generally not equipped or trained to make a determination as to the specific type of utility facility to which they are proximate while installing their equipment. By far, the safest course is to require that the 40-inch standard be employed. Even Mr. Harrelson's evaluation mistakes the type of facility involved. The poles cited by Mr. Harrelson, poles 604 and 608 in Circuit V620, are not primary risers at all, but are in fact secondary risers – which *do* require 40 inches of separation.²⁴²

C. The Circuit-Based Prohibition on New Attachments Was Necessary and Appropriate Under the Circumstances

114. As illustrated herein, Complainants' plant is riddled with safety violations including low hanging cables, cables in close proximity to energized portions of EAI's plant, unbalanced loading, overloaded anchors, and missing guy wires. The Cable Operators have refused, or have been unwilling, to provide EAI with copies of their own construction and operational standards (if they even exist) in order for EAI to evaluate their sufficiency and compatibility with the use of EAI's poles.²⁴³ These safety violations demonstrate a pervasive lack of commitment to safety, and an utter disregard for the integrity of EAI's plant and the services of other attaching entities. For this reason alone, EAI would have been justified in requiring a complete plant clean up before permitting additional attachments to *any* pole by such frequent offenders.

115. At the very minimum, however, EAI found that it was appropriate from an engineering and administrative perspective to permit new attachments by the Cable Operators on a circuit-by-

²⁴² Declaration of Lonnie Buie, Professional Engineer, Pettit & Pettit Consulting Engineers, Inc., at ¶ 80.

²⁴³ Declaration of Tony Wagoner at ¶ 13; Letter from Wm. Webster Darling, Senior Counsel, Entergy Arkansas, Inc., to Kyle Birch, Senior Counsel, Comcast, dated June 4, 2003, attached as Exhibit "26."